STATE OF CALIFORNIA GRAY DAVIS, GOVERNOR

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
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January 23, 2001

Mavis McAllister
Northern California Carpenters
Regional Council
448 Hegenberger Road
Oakland, CA 94621-1418

RE: Public Works Case No. 2000-043
13th and F Street Townhouse Development
City of Sacramento

Dear Ms. McAllister:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to Title 8, California Code of Regulations, section 16001(a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the 13th and F Street Townhouse Development ("Project") is a public work subject to the payment of prevailing wages.

The Project involves the construction of 10 townhouses in the city of Sacramento and was initiated by the Sacramento Housing and Redevelopment Agency ("SHRA"). The contract for the work is between Cristina Anderson and Michael Krambs as Anderson-Krambs LLC, the owner/developer ("developer"), and Stephenson & Hail, the general building contractor.

According to a document entitled the Budget for Development, the total Project costs are $1,918,925. The funding sources include $1,192,125 in private lender funds, $190,740 in "developer fees" and $127,160 in developer cash contributions. In addition, the Redevelopment Agency of the City of Sacramento ("Agency") made two no-interest "loans" to the developer using tax increment funds set aside for the development of low- and moderate-income housing. The two loans are a land acquisition loan of $108,900[1] and a construction loan of $300,000. Under the terms of the loan agreements between Agency and developer, one-tenth of the amount of each loan is forgiven with the sale of each of the 10 units, until the entire balance is forgiven. Following forgiveness of the total principal amount of the acquisition and construction loans, the Construction and Permanent Notes respective to each

[1] The Agency purchased the property in 1993 for $547,000.

loan terminate, and the Agency re-conveys the Deed of Trust to the developer.[2] All units have been sold.

Labor Code section 1720(a) generally defines public work to mean: "Construction, alteration, demolition or repair work done under contract and paid for in whole or in part out of public funds." The Project is construction, performed under contract. The issue presented here is whether the Project is paid for in whole or in part out of public funds. For the following reasons, I find that it is.

In analyzing a financial transaction it is important to look at the substance of the transaction to determine its true character. Here, public funds are expended on a construction project in the form of an ostensible loan agreement that does not contemplate repayment. Such a transaction is no different in substance than an outright grant of public funds.

Agency and SHRA contend that the two Agency loans are not public funds under Title 8, California Code or Regulations, section 16000 ("loan regulation"). The loan regulation excludes from the definition of public funds "money loaned to a private entity where work is to be performed under private contract, and where no portion of the work is supervised, owned, utilized, or managed by an awarding body." Implicit in the legal construct of a loan is the obligation to repay. Civil Code section 1912 defines a loan of money as "a contract by which one delivers a sum of money to another, and the latter agrees to return at a future time a sum equivalent to that which he borrowed." Certainly where a private entity obtains a loan of public monies for a construction project and repays the loan in its entirety, it cannot be said that the project was paid for in whole or in part out of public funds. A "loan" that does not contemplate repayment, however, does not fall within the ambit of the loan regulation.

This analysis is consistent with analogous tax law. For income tax purposes, gross income is defined as "all income from whatever source derived, including income from discharge of indebtedness. . . ." 26 U.S.C. § 61(a). As explained in Tax Court Memorandum Opinion 1993-73, "[o]btaining a loan is not a

[2] Repayment of the loans is only required if the developer is in material breach of the terms of the Note, the Deed of Trust, the Disposition and Development Agreement, the Regulatory Agreement or the Declaration of Restrictions. The Department, not having been informed of any breaches, assumes the developer is in compliance.

taxable event, despite the accession to wealth, because of the obligation to repay the loan. But when a taxpayer is released from that obligation, he or she has realized an accession to income because the cancellation effects a freeing of assets previously offset by the liability arising from such indebtedness." Similarly, for gift tax purposes, "a taxable transfer may be effected by . . . the forgiving of a debt . . ." 26 C.F.R. § 25.2511-1(a).[3]

Also, reliance by Agency and SHRA on *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576 is misplaced. *McIntosh* is cited for the proposition that making land available for "lease or sale and financing or assisting in the financing of its acquisition" does not make the resulting project a public work. In this matter, there is no lease, no sale and no assistance in the financing of the land acquisition. What there appears to be is a land give-away in the form of loan forgiveness. Further, *McIntosh* involved a sublease of land and forbearance of rent. The Court found that rent forbearance does not constitute a **payment** of funds. More significantly, the definition of funds employed by the Court encompassed "'available pecuniary resources ordinarily including cash and negotiable paper' [citation], and in a legal context the courts have also taken it to include property of value which may be converted into cash [citations]. *Keene v. Keene* (1962) 57 Cal.2d 657, 663. . . ." *Id.* at 1588. *McIntosh*, therefore, supports this Department's view that Agency's contribution of free land to the Project constitutes a payment of public funds.

For the reasons stated above, the 13th and F Street Townhouse Development is a public work within the meaning of Labor Code section 1720(a) and is subject to California's prevailing wage requirements.

Sincerely,

Stephen J. Smith

Stephen J. Smith
Director

cc: Daniel M. Curtin, Chief Deputy Director

[3] Interesting to note also that, under the Political Reform Act of 1974, the definition of "expenditure" includes both a payment and a forgiveness of a loan. Gov. Code § 82025.